RINTIS UTAMA SDN. BHD.

v.

JABATAN KASTAM DAN EKSAIS DIRAJA

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J
[CIVIL APPEAL NO. T(11) 5 OF 1995]
11 OCTOBER 1995

CUSTOMS & EXCISE: *Customs Act 1967, s. 135(1)(d) - Summons - Offence - Possession of prohibited goods - Magistrate's finding - Vehicle uncustomed goods - Whether Magistrate allowed to go beyond summons - Whether bound by summons.*

The appellant's vehicle was seized by the Royal Customs and Excise Department after it was suspected of not having gone through Customs, and the appellant was subsequently summoned by the Magistrate under s. 128(4) of the Customs Act 1967 for having in possession prohibited goods. Unknown to the appellant, the initial registration of the vehicle was procured improperly by using a forged customs import declaration. At the end of the hearing, the Magistrate concluded that the vehicle was uncustomed goods, the duty of which had not been paid, and it was upon the appellant to prove that the customs duty had been paid, which the appellant failed to discharge. The Magistrate ordered forfeiture. The appellant appealed on the ground that the summons issued referred to the offence under s. 135(1)(d) as "prohibited goods", and the Magistrate was wrong to entertain the offence as "uncustomed good" in the enquiry. It was further argued that the appellant had no knowledge that custom duty on the vehicle had not been paid and submitted that the offence was not made out.

The deputy public prosecutor on the other hand referred to the fact that s. 135(1)(d) has the word "or" in between the words "uncustomed" and "prohibited", and as such the summons can be taken to include uncustomed goods.

Held:

[1] The Court need only to concern itself whether an offence has been committed and not any particular offence. Though the summons referred to the offence relating to prohibited goods, it is not a misdirection on the part of the learned Magistrate to find an offence of uncustomed goods just because the summons did not refer to the offence of uncustomed goods.

[2] What had to be established is not whether the appellant had the guilty knowledge but whether someone had at any time caused the vehicle to be brought into the country without payment of the customs duty. On the evidence, the learned Magistrate was justified in her conclusion that customs duty was not paid.

[Appeal dismissed].

Case referred to:
Keng Soon Finance Bhd. v. Pegawai Kanan Kastam, Johore Bahru [1981] 2 MLJ 249 FC ***(foll)***

Legislation referred to:
Customs Act 1967, ss. 128(4), (5), 135(1)(c), (d), (g)

For the appellant - Lim Chin Wu; M/s. Chong & Pang
For the respondent - Hazman bin Ahmad, DPP

JUDGMENT

Ian H.C. Chin J:

Introduction

The dispute concerns a Toyota Landcruiser numbered SA4994K ("the vehicle") which was registered under the law on 12 December 1992, and the registered owner, according to the certificate issued by the Road Transport Department, Malaysia, was Liew Ket Min (IC.II.0648890) of P.O. Box No. 166, Tg. Aru. Kota Kinabalu. This vehicle was recorded in the certificate as having been transferred to Tawau on 9 January 1992 and the vehicle was on diverse dates transferred first to a Mok Kiong @ Mok Cheh Hiong, then to Lim Chi Kong and thereafter to Sunace Corporation Sdn. Bhd. ("Sunace"). On 23 February 1993, Sunace caused the vehicle to be transferred to Rintis Utama Sdn. Bhd. ("the appellant"), the present appellant, but the purchase was financed by D & C Leasing Sdn. Bhd. whose name was endorsed on the certificate as having a claim against the vehicle. The appelant has to paid Sunace M72,543.31 for the purchase of the vehicle. A few months afterwards, on 18 June 1993, the Royal Customs & Excise Department ("the Customs") seized the vehicle but no prosecution ensued. Instead, proceedings were commenced by the Customs under s. 128(4) of the Customs Act 1967.

Unknown to the appellant, the initial registration of the vehicle was procured improperly by using a customs import declaration that was proved beyond any reasonable doubt to be forged. The apparent chassis number had been altered. No evidence was forthcoming that import duty on the vehicle had been paid.

The vehicle was seized because, according to the officer of the customs who testified, it was in a list of vehicles suspected of not having gone through the customs. The matter was referred to the Magistrates Court and mentioned on 28 March 1994, and a hearing was scheduled for 1 December 1994 but did not proceed and the matter was again mentioned on 9 February 1995. On 9 February 1995, the Registrar of the Magistrates Court issued a summons, *viz*.:

Malaysia
Negeri Sabah
Permohonan Pebagai No. T.S. (87) 456/93

Penguasa Kastam Pengadu:
Tawau
(U.P: Encik Abdullah Jaafar) Respondent: Rintis Utama Sdn. Bhd.
Etc ...

Saman
(Seksyen 128(4) Akta Kastam, 1967)

BAHAWASANYA telah dilaporkan oleh Penguasa Kastam, Kastam Cawangan Pencegah Tawau bahawa barang-barang yang tersebut di bawah ini telah dirampas pada 18 Jun 1993 di Bandar Tawau

1 unit Toyota Wagon
Etc ...

DAN BAHAWASANYA seperti mana yang dilaporkan barang-barang yang tersebut di atas sebetulnya menjadi perkara utama dalam melakukan sesuatu kesalahan di bawah Sek. 135(1)(d) iaitu memiliki barang-barang larangan dan tidak ada pendakwaan mengenai barang-barang yang tersebut di atas.

MAKA DENGAN INI KAMU ADALAH di saman supaya hadir di hadapan Mahkamah Majistret di Tawau pada 24-29 haribulan April 1995 yang akan datang pada pukul 10 pagi untuk menunjukkan sebab yang berpatutan mengapa barang-barang yang tersebut di atas tidak boleh dilucutkan.

DAN BAHAWASANYA apabila kamu hadir atau mungkir hadir, setelah penyerahan sewajar saman ini dibuktikan, Puan Majistret ini hendaklah meneruskan pemeriksaan perkara ini, dan apabila dibuktikan bahawa sesuatu kesalahan terhadap kenderaan ini telah dilakukan dan bahawa barang-barang itu adalah perkara utama atau telah digunakan dalam melakukam kesalahan itu, hendaklah memerintahkan supaya barang-barang itu dilucuthak, atau boleh, jika tidak ada bukti demikian, memerintahkan supaya barang-barang itu dilepaskan

...

A hearing was then conducted and evidence adduced and the learned Magistrate on 29 April 1995, ordered the vehicle to be forfeited to the Customs. Hence this appeal by the appellant. The legislation that governs the matter is s. 128(4) and (5) of the Customs Act 1967 ("the Act"), which terms are:

128 Goods seized in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month.

(1) ...

(2) ...

(3) ...

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under para. (a) or (b) of subsection (1) of s. 115, as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under para. (a) or (b) of subsection (1) of s. 115, as the case may be.

(5) In any proceedings under subsection (4), s. 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

The Contentions

This brings me to the first of the contentions of Mr. Lim Chin Wu, learned Counsel for the appellant which is, that since the summons issued to the appellant specifically adverted to an offence under s. 135(1)(d) of the Act, the learned Magistrate is bound by the said summons to find whether there was that offence under s. 135(1)(d) and is not allowed to go beyond that to find other offence or offences under the Act. It is not disputed that the summons referred specifically to the offence under s. 135(1)(d), the relevant part of which section says:

> Whoever ... knowingly harbours, keeps, conceals, or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods ... shall be guilty of an offence and shall on conviction ... be liable to a fine ... or to imprisonment for a term not exceeding four years or to both.

Though the said section speaks of two categories of goods, that is uncustomed and prohibited goods, the summons that was issued to the appellant speaks only of prohibited goods. Given the fact that the supposed customs import declaration that was used to procure the registration of the vehicle was a forgery, the learned Magistrate was justified in her conclusion that the vehicle was uncustomed goods in that customs duty had not been paid. She was also correct in concluding that given the state of evidence adduced by the Customs the burden was upon the appellant to prove that the customs duty had been paid and this burden, the learned Magistrate correctly concluded, the appellant had failed to discharge. But, Mr. Lim submitted, the learned Magistrate should have confined herself to determining whether the vehicle was prohibited goods as asserted in the summons. This is how Mr. Lim had submitted:

> The summons clearly refer to the offence as "prohibited goods, under s. 135(1)(d) and there was no amendment to the summons at any stage of the enquiry. The appellant has relied on the summons and the offence stated therein in preparation and conduct of the enquiry to meet all issues in relation to the said offence of prohibited goods under s. 135(1)(d). There was no indication from the respondent Jabatan Kastam & Eksais DiRaja (hereinafter referred to as "Kastam") at anytime up to the close of the appellant's submission that the Kastam would be relying on other unspecified offences.
>
> Hence it would be wrong for the learned Magistrate to entertain other unspecified offence in the enquiry.
>
> Firstly, the appellant would be deprived of the opportunity to meet and attack the issues of the unspecified offence. This is supported by *Keng Soon* which states that "... evidence ... may be tendered by the claimant in order to satisfy itself there is such proof."
>
> Secondly, the appellant has been taken by surprise without notice from the Kastam of such unspecified offence.
>
> Thirdly, it would tantamount to a travesty of justice and there is no fair play and natural justice.
>
> Therefore I humbly submit that the Kastam is confined to the summons and the Learned Magistrate is bound in the enquiry to examine an offence under s. 135(1)(d) for prohibited goods only. The learned Magistrate would be misdirecting herself and acted wrongly if she examined other unspecified offence.

Mr. Hazman bin Ahmad, learned Deputy Public Prosecutor for the Customs, did not make any pointed reply but merely refers to the fact that s. 135(1)(d) has the word "or" in between the words "uncustomed" and "prohibited". I will assume what he meant is that even though the summons referred to prohibited goods, it can be taken, because of the word "or" in that section, to include uncustomed goods. The point taken by Mr. Lim was also raised in *Keng Soon Finance Bhd. v. Pegawai Kanan Kastam, Johore Bahru* [1981] 2 MLJ 249 FC. In that case, the summons adverted to an offence under s. 135(1)(g) while the learned President found an offence under s. 135(1)(c) and it was argued before the High Court the learned President had as a result thereof erred in law. Syed Othman J in the High Court came to the conclusion that the President need only concern himself whether an offence has been committed and not any particular offence. On a reference to the Federal Court, this point though mentioned was not commented on directly but since there was no criticism by the Federal Court on that conclusion, I would assume that the judgment of Syed Othman J was

correct. Furthermore, the Federal Court in *Keng Soon Finance Bhd. v. Pegawai Kanan Kastam, Johore Bahru* seems to be of the view that the presiding officer needs only satisfy himself that an offence had been committed against the Act and not any particular offence when the following was at p. 250 said:

> It must be noted that in proceedings pursuant to s. 128(4) of the Act, the function of the President or the Magistrate, as the case may be, is to examine the matter pertaining to the claim by the owner of the goods seized. In doing so he has to satisfy himself that firstly, an offence against the Act has been committed and secondly, either (a) the goods were the subject matter of the offence, or (b) where the claim relates to the conveyance, such conveyance was used in the commission of the offence.

Therefore, though the summons referred to the offence relating to prohibit goods, it is not a misdirection on the part of the learned Magistrate to find the offence of uncustomed goods just because the summons did not refer to the offence of uncustomed goods. That the offence relating to uncustomed goods would be relied on was apparent and known to the appellant and their Counsel when the officers of Customs, Rahmat bin Jimmy and Abdullah bin Jaapar, gave evidence and adverted to the vehicle being uncustomed and customs duty thereon not being paid. In fact the witnesses for the prosecution were cross-examined on this point by Mr. Lim. Furthermore, when the witness for the appellant testified they all adverted to the question of custom duty and they denied any knowledge that custom duty on the vehicle had not been paid. I do not see how the appellant can be said to have been surprised or been denied the opportunity to defend the allegation that customs duty on the vehicle was not paid.

Mr. Lim then argued that the appellant had no knowledge whatsoever that customs duty was not paid and he submitted that the offence was not made out. What had to be established, and this Mr. Lim seems to miss, is not whether the appellant had the guilty knowledge but whether someone had at any time caused the vehicle to be brought into the country without payment of the customs duty. On the evidence, the learned Magistrate was justified in her conclusion that customs duty was not paid.

Conclusion

Reluctantly, I have to dismiss the appeal. The reason I am reluctant is because a department of government, namely the Road Transport Department had issued a certificate that clothes the vehicle with all its legalities with the result that the public are entitled to rely on and did rely on the certificate as there is a presumption of regularity as regards the issue of the certificate. In this case, the appellant and the finance company had relied on the said certificate to their detriment. The plight of the appellant was brought about by the Road Transport Department which should not have issued the certificate. If there was a case more deserving of sympathetic consideration, this is the one. I wonder whether the Road Transport Department is sheltered by any law when it issued a certificate when it should not and thus caused harm to the general public. Having said that, I confirm the order of forfeiture made by the learned Magistrate.